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No. 73-1316

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This case, together with *National Labor Relations Board* v. *Sears, Roebuck & Co.*, No. 73-1233, also pending on petition for a writ of certiorari, presents significant issues concerning Exemption 5 which, contrary to petitioner's contention (Br. in Opp. 2, 6), involve far more than the particular agency and the facts of this case.

Under the reasoning of the District of Columbia Circuit, "a document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties" must be made public even though it was "originally prepared for purposes of predecisional consultation" (Pet. App. A, p. 21A). This ruling is thus not limited to the special procedures of the Renegotiation Board or the particular documents involved; instead, it is a broad decision which seriously

impairs the protection of the decisional process, which *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, recognized to be the primary purpose of Exemption 5.[1]

The alternative holding of the court of appeals—that the reports of regional boards are "opinions" of "agencies"—also seriously limits the scope of Exemption 5. Under that ruling, virtually any agency which properly delegates some of its preliminary tasks to subordinate officials jeopardizes the ability of those who make the delegation to consult freely with those who perform the preliminary tasks (see discussion in Petition 7-9).

Finally, respondent claims that because the Renegotiation Board has recently amended its regulations to provide for the issuance of opinions in the future, "little would be gained by having this Court review the decision below" (Br. in Opp. 4-5). The Board's new regulations, however, require the preparation of formal agency opinions; they do not provide for the disclosure of pre-decisional deliberative documents of the type involved here. In any event, regardless of the particular practices of any specific agency, the decision below constitutes an authoritative interpretation of the scope of Exemption 5. That interpretation of the scope of Exemption 5. That interpretation will, if left standing, seriously impair the deliberative processes of agencies throughout the government.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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[1] As noted in our petition, the court of appeals' judgment in *National Labor Relations Board* v. *Sears, Roebuck & Co.*, No. 73-1233, was based in part on the instant case (Pet. 6, n. 12). Thus, the court of appeals did not view its decision as a narrow one.